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**UNITED STATES DISTRICT COURT  
 DISTRICT OF ARIZONA**

TOBIAS GOTBAUM, NATHANIEL  
 GOTBAUM, ELLA GOTBAUM, the natural  
 children of Carol Anne Gotbaum by and  
 through their next friend, Noah Gotbaum; and  
 the ESTATE OF CAROL ANNE GOTBAUM,

Plaintiffs,

v.

CITY OF PHOENIX, a public entity; CITY  
 OF PHOENIX POLICE DEPARTMENT;  
 CHIEF JACK HARRIS; JASON K. TOTH;  
 ANDREW B. WONYA; DUANE A. RIGG,  
 JR.; DICK C. RICHARDS; TERRI L.  
 KLEPPER, JOHN DOE OFFICERS I-X;  
 JANE DOE OFFICERS I-X; JOHN DOE  
 SUPERVISORS I-X; JANE DOE  
 SUPERVISORS IX; JOHN DOES I-X; JANE  
 DOES I-X; BLACK CORPORATIONS I-X;  
 and WHITE PARTNERSHIPS I-X,

Defendants.

NO. CV08-937-PHX-DGC

**DEFENDANTS' MOTION TO  
 DISMISS PRE-DEATH  
 SUFFERING CLAIMS**

Under Arizona's Wrongful Death Act, A.R.S. § 12-611, *et seq.*, Plaintiffs  
 cannot recover damages for a decedent's pre-death suffering. Moreover, Plaintiffs cannot

1 recover damages for a decedent's pre-death suffering under Arizona's survival statute,  
2 A.R.S. § 14-3110. In addition, because federal law is silent on this issue, the Estate of  
3 Carol Anne Gotbaum is also precluded from recovering damages under 42 U.S.C. §1983  
4 due to the appropriate application of the law of Arizona, the forum state. Thus, dismissal  
5 of any claim for the alleged pre-death suffering of Carol Anne Gotbaum is mandated  
6 pursuant to Rule 12(b)(6), Fed.R.Civ.P.

## 7 **I. FACTS**

8 This case arises out of the death of Carol Anne Gotbaum at Phoenix Sky  
9 Harbor Airport while in the custody of Phoenix Police. Plaintiffs filed first in Arizona  
10 Superior Court; Defendants removed that action to Federal District Court.

11 Plaintiffs bring this wrongful death action pursuant to A.R.S. §12-611, *et*  
12 *seq.*, DEATH BY WRONGFUL ACT and 42 U.S.C. §1983.<sup>1</sup> Plaintiffs specifically allege  
13 in their First Amended Complaint that the Estate has suffered damages in the form of pre-  
14 death pain and suffering pursuant to applicable law.<sup>2</sup>

## 15 **II. NO PLAINTIFF CAN RECOVER PRE-DEATH SUFFERING DAMAGES** 16 **UNDER ARIZONA'S WRONGFUL DEATH STATUTES.**

17 Under Arizona's wrongful death statutes, statutory beneficiaries may  
18 recover damages that the decedent would have been able to recover, had death not ensued.  
19 A.R.S. § 12-611, *et seq.* "[A]n action for wrongful death is an *original and distinct claim*  
20 *for damages* sustained independent of those injuries personal to the decedent." *Halenar v.*  
21 *Superior Court*, 109 Ariz. 27, 29, 504 P.2d 928, 930 (1972) (emphasis added); *see also In*  
22 *re Lister's Estate*, 22 Ariz. 185, 195 P. 1113 (1921) (wrongful death statute creates a new  
23 cause of action for the wrongful death). Claims by the beneficiaries under the wrongful  
24 death statute, however, are *not* derived from the decedent's claims. *Schoenrock v. Cigna*  
25 *Health Plan of Ariz., Inc.*, 148 Ariz. 548, 550, 715 P.2d 1236, 1238 (App. 1985) (citing  
26 *Huebner v. Deuchle*, 109 Ariz. 549, 514 P.2d 470 (1973)). Statutory beneficiaries recover

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27 <sup>1</sup> See paragraph 1 of Plaintiffs' First Amended Complaint.

28 <sup>2</sup> See paragraph 117 of Plaintiffs' First Amended Complaint

for damages they suffered from the death of the decedent – *not those injuries the decedent suffered*. See *Mullen v. Posada Del Sol Health Care Ctr.*, 169 Ariz. 399, 400, 819 P.2d 985, 986 (App. 1991)(emphasis added). For example, beneficiaries may recover for “loss of love, affection, companionship, consortium, [and] *personal* anguish and suffering.” *Id.* (emphasis added). Thus, the wrongful death statutes preclude any Plaintiff, including the Estate of Carol Anne Gotbaum, from recovering damages for any alleged pre-death suffering by Carol Gotbaum because they did not personally suffer those injuries.

### III. PLAINTIFFS CANNOT RECOVER DAMAGES FOR PRE-DEATH SUFFERING UNDER ARIZONA’S SURVIVAL STATUTE.

Plaintiffs have not alleged any claims under Arizona's survival statute. Plaintiffs incorporated all of their claims, including their inappropriate claims for pain and suffering noted above, under 42 U.S.C. § 1983. Title 42 U.S.C. § 1983 is silent as to whether pain and suffering damages survive death. But Arizona law, specifically A.R.S. §14-3110, is not. In areas on which federal law is silent, federal courts must borrow the law of the forum state unless it is inconsistent with the purposes of the federal law. 42 U.S.C. § 1988.

Arizona's survival statute provides as follows:

Every cause of action, except a cause of action for damages for breach of promise to marry, seduction, libel, slander, separate maintenance, alimony, loss of consortium or invasion of the right of privacy, shall survive the death of the person entitled thereto or liable therefore, and may be asserted by or against the personal representative of such person, **provided that upon the death of the person injured, damages for pain and suffering of such injured person shall not be allowed.**

Ariz. Rev. Stat. § 14-3110 (emphasis added)

Arizona law is clear: pre-death pain and suffering of a decedent is not actionable.

Under federal law, a federal court sitting in Arizona would apply the Arizona survival statute precluding a decedent's estate from recovering pain and suffering

1 damages to determine damages available in federal civil rights claims. 42 U.S.C. § 1983;  
 2 42 U.S.C. § 1988; Ariz. Rev. Stat. § 14-3110. In the present matter, Arizona's survival  
 3 statute prohibits recovery of damages for the decedent's pain and suffering and, thus,  
 4 precludes the §1983 claims allegedly stemming from the pre-death pain and suffering of  
 5 Carol Anne Gotbaum.

6 **IV. PLAINTIFFS CANNOT RECOVER DAMAGES FOR PRE-DEATH**  
 7 **SUFFERING UNDER 42 U.S.C. § 1983.**

8 An Arizona court has already held that Arizona's survival statute is *not*  
 9 inconsistent with § 1983 by precluding recovery of pre-death pain and suffering. *Badia v.*  
 10 *City of Casa Grande*, 195 Ariz. 349, 988 P.2d 134 (App. 1999). Other courts have also  
 11 held survivorship statutes similar to Ariz. Rev. Stat. § 14-3110 are not inconsistent with  
 12 the purposes of 42 U.S.C. § 1983, and, therefore, a plaintiff cannot recover for the  
 13 decedent's pain and suffering. *See, e.g., Venerable v. City of Sacramento*, 185 F. Supp. 2d  
 14 1128, 1133 (E.D. Cal. 2002). Moreover, the United States Supreme Court stated, “[a]  
 15 state statute cannot be considered ‘inconsistent’ with federal law merely because the  
 16 statute causes the plaintiff to lose the litigation.” *Robertson v. Wegman*, 436 U.S. 584,  
 17 593 (1978). Under Arizona's wrongful death and survival statutes statutes, there is no  
 18 basis for statutory beneficiaries to recover for pre-death injuries suffered by the decedent  
 19 under 42 U.S.C. section 1983 or otherwise.

20 **V. CONCLUSION**

21  
 22 In the First Amended Complaint, the Estate of Carol Anne Gotbaum  
 23 specifically seeks damages for pre-death pain and suffering of the decedent, Carol Anne  
 24 Gotbaum. Nevertheless, the Estate is not entitled to pursue such damages in an Arizona  
 25 wrongful death action. The wrongful death statutes, A.R.S. §12-611, *et seq.* and the  
 26 survival statute, A.R.S. § 14-3110 specifically forbid such a claim. In addition, due to the  
 27 silence of federal law on this issue, the Estate is also precluded from recovering damages  
 28 under 42 U.S.C. §1983 after the appropriate application of the law of Arizona, the forum

1 state. Therefore, Defendants move this Court for an order dismissing all claims for pre-  
2 death pain and suffering alleged in Plaintiffs' First Amended Complaint.

3 RESPECTFULLY SUBMITTED this 11th day of July 2008.

4 JONES, SKELTON & HOCHULI, P.L.C.

5  
6 By s/Joseph J. Popolizio

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13 **CERTIFICATE OF SERVICE**



15 I hereby certify that on July 11, 2008, I electronically transmitted the attached  
16 document to the Clerk's Office using CM/ECF System for filing and transmittal of  
17 a Notice of Electronic Filing to the following CM/ECF registrants:

18 Michael Manning  
19 Leslie E. O'Hara  
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25 COURTESY COPY mailed this same date to:

26 Honorable David G. Campbell  
27 United States District Court  
28 Sandra Day O'Connor U.S. Courthouse, Suite 623  
401 West Washington Street, SPC 58  
Phoenix, AZ 85003-2156

26 s/Joseph J. Popolizio